JD(SF)-10-03
Anchorage, Alaska

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

ALASKA TEPANYAKI, LLC
d/b/a BENIHANA'S

and Case 19-CA-27875

ROMULO MENDEZ, an Individual

and Case 19-CA-27913

HOTEL EMPLOYEES RESTAURANT EMPLOYEES UNION LOCAL 878, affiliated with HOTEL EMPLOYEES RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL-CIO, RLEA, CLC

John H. Fawley, Esq.
for the General Counsel.

Brian R. Shute, Esq., of Anchorage, Alaska
for the Respondent.

DECISION

I. Statement of the Case

Thomas M. Patton, Administrative Law Judge. This case was tried in Anchorage, Alaska on July 23-24, 2002. The charge in case 19-CA-27875 was filed December 29, 2001 and the charge in case 19-CA-27913 was filed February 4, 2002. A consolidated complaint issued April 30, 2002.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:[2]

[1] At the opening of the hearing the complaint was amended to correct the name of employee "Danny Cruz" to read "Danny Delacruz." The transcript and the exhibits, including a document signed by the employee, indicates that the correct spelling is "Danny de la Cruz."

[2] A post-hearing motion to correct an inadvertent error in the Brief for the General Counsel is granted.

Findings of Fact

A. Jurisdiction

Alaska Tepanyaki, LLC d/b/a Benihana's (the Employer or Respondent) operates a franchised restaurant in Anchorage, Alaska. The Respondent admits, the record establishes and I find that the Respondent meets the Board's standards for asserting jurisdiction and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. The labor organization

The complaint alleges and the Respondent denies that Hotel Employees and Restaurant Employees Union Local 878, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO, RLEA, CLC (the Union) is a labor organization. For the reasons discussed in detail later, the evidence establishes that the Union is a labor organization within the meaning of Section 2(5) of the Act.

C. The alleged unfair labor practices

1. The complaint alleges that on December 16, 2001, an agent of Respondent interrogated employees about the source of concerted, work-related complaints by employees. [3]

2. It is alleged that on about December 20, an agent of Respondent questioned employees about whether they had signed union cards or knew who had done so.

3. The complaint alleges that on December 16 Respondent discharged employee Romulo Mendez in violation of Section 8(a)(1) and (3).

4. It is alleged that from December 16 to December 20 employees of Respondent went out on a strike that was an economic strike and an unfair labor practice strike. It is further alleged that on December 20 the strikers made an unconditional offer to return.

5. The complaint alleges that the Respondent violated Section 8(a)(1) and (3) by refusing to reinstate the former strikers.

D. Introduction

The Respondent operates what is known as a tepanyaki-style restaurant in Anchorage, Alaska. Tepanyaki chefs cook food while customers watch. The customers are seated around a grill where the food is cooked. The chef entertains the customers while cooking, including the performance of a routine involving the skilled use of knives and special dramatic cooking techniques. The restaurant is owned by John Blomfield and is managed by Chief Financial Officer Tamela Hines. The food service employees, consisting of chefs, food preparation employees, waitresses, dishwashers and janitors are under the overall supervision of Takeo Okamoto. The head waitress is Sue Chong. Atsuko Okamoto is hostess and supervises dishwashers and janitors. Ever Lopez is the chief chef. The chefs who worked under Lopez are alleged to have been discriminated against. Those chefs are Steven Bae, Eltie Im, Romulo "Romy" Mendez, Danny de la Cruz, Chris Koko, Ki Lee, and Edward Ticknor (herein the chefs).[4]

[3] All dates July 2001 through April 2002, unless otherwise noted.

[4] The name of Ki Lee also appears as Ki Lam Yi in some documents.

The entertainment provided by tepanyaki chefs is a central and essential part of the Respondent's operation. A training period of about six weeks is necessary to learn the special skills necessary to serve as a tepanyaki chef. There are no other tepanyaki restaurants in Alaska and no local pool of experienced tepanyaki chefs. The chefs are paid hourly and receive tips. They are required by the Employer to share their tips equally with the waitresses. The chefs share their portion of the tip with various other employees.

The witnesses called by the General Counsel were chefs Mendez, Bae, Koko, Ticknor Im and janitor/dishwasher Everett Scott Burnett. The witnesses called by the Respondent were chief chef Lopez and Chief Financial Officer Tamela Hines. There were varying accounts by several witnesses regarding the events discussed below. My resolution of what occurred on each occasion is based upon a composite of the testimony that was credibly offered, considering the probabilities. Much of the testimony describes events that are not in dispute. The different versions of the events described by the chefs were largely immaterial differences in detail and emphasis that do not warrant detailed discussion.

E. The evidence

1. July or August

In July or August there was a meeting at the restaurant. Present were the chefs, Lopez, Takeo Okamoto, Atsuko Okamoto and Chong. At this meeting the chefs addressed two issues. The first issue was the even division of tips between chefs and waitresses. The essence of the chefs' tip distribution complaint was that because there were more chefs than waitresses, individual waitresses received more tip income than a chef, notwithstanding the chefs' skilled work. Takeo Okamoto told the chefs that the policy would not be changed and, in substance, that if they did not like the policy, they should quit.

The second complaint raised by the chefs was that the venting of smoke from the grills where they cooked was inadequate. Several of the chefs experienced pulmonary problems that they attributed to breathing smoke from the grills. Takeo Okamoto acknowledged the problem and told the chefs that someone was coming from Chicago to address the problem, but that it would be several months before that was done. Later, an engineer did assess the ventilation issue. The ventilation system was found to meet local code requirements and the Employer attributed the smoke problems to the chefs using excessive cooking oil. The chefs were given training regarding the proper amount of oil, but the chefs continued to view the ventilation as unsatisfactory.

2. November

In November Bae raised the tip issue again with Lopez. Lopez said he would speak to Takeo Okamoto about the issue. Later Lopez told Bae that he had spoken with Takeo Okamoto about the tip division. Lopez reported that Okamoto had said that he was not going to change the tip policy and that Lopez was to tell Bae to be quiet about the matter and to not bring it up again.

3. December 15

Mendez, Lee, Ticknor and de la Cruz worked together on the December 15 lunch shift. Mendez returned to work at 3:00 p.m. for the evening shift. Also present were Im, Bae, Ticknor, de la Cruz, Koko and Lee. Chong gave Mendez his portion of the chefs' half share of the tip from lunch. Mendez calculated that the two waitresses who had worked lunch would received

about $80 each, while the chefs would have about $35 each after they gave a portion of their tip to the kitchen help, dishwashers and the front desk.

The chefs discussed the tip issue and approached Lopez. Mendez told Lopez that the tip distribution was unfair and after some discussion Lopez left to speak to Takeo Okamoto. The chefs then discussed the matter as they worked on food preparation. They decided that they should speak directly to Takeo Okamoto and walked as a group to his office. As they arrived Lopez and Okamoto came out. Mendez credibly described the conversation that ensued as follows:

> Q Okay. And what happened when you all got to Takeo's office?
> A Well, I spoke first and I -- I told him we got to do something about the situa -- tip situation because it wasn't fair, what are we getting. And he just
> Q And did he respond -- who responded to you?
> A Takeo.
> Q Okay. And what was his response when you again raised the tip distribution problem?
> A Well, he get upset right away and he just told me I'm not changing, you don't like it go home and never come back, that's the first words he -- he told me.
> Q And what, if anything, did you say to him?
> A Well, I told him, hey, calm down, you know, just -- just getting upset again. And -- and you know what, if you send me home I'm -- I'm out of here, I'm not going myself, everybody's walking out because this is not -- that's not right. Then . . . .
> Q Okay. Was there any solution reached during this meeting between the parties?
> A Well, Ever Lopez suggest -- just asking, okay, what do you guys want of me, get some more service or something? And I said hey, anything comes -- makes more fair. So they suggest a meeting for the next day.
> Q Did the chefs agree to that?
> A Yes.
> Q And when was the meeting scheduled to take place?
> A At that time they scheduled for 3:00 p.m. the next day,

3. December 16

Stephen Bae was scheduled to work the morning of December 16. When he arrived Lopez told him that Okamoto was very angry and that the planned meeting with the chefs had been cancelled. Later that morning Okamoto told Bae that he wanted to speak with him in the office. Once they were in Okamoto's office, Okamoto asked Bae who had started the issue about the tips and ventilation, to which Bae replied that they all did. Okamoto said that was all he needed to find out and Bae left. Bae informed the other chefs that the meeting with Okamoto was cancelled and the chefs agreed that they would all meet at Mendez's house at 3:00 p.m. that day.

On the afternoon of December 16 the chefs assembled at Mendez's house at about 3:00 p.m. Initially all the chefs but Im were present. Bae had a letter to Takeo Okamoto that he had drafted after he learned that Okamoto had cancelled the meeting with the chefs. The letter stated that the employees intended to go on strike in protest of the tip distribution policy and the ventilation issue.

Earlier in the day on December 16 Mendez had been away from his home, returning about 2:30 p.m. After arriving at his house Mendez learned that a telephone message had been left by Lopez, to the effect that Takeo Okamoto was very upset and wanted Mendez to call him.

At about 3:15 p.m. Takeo Okamoto called Mendez again and asked him to come to the restaurant. Mendez went to the restaurant, arriving about 4:10 p.m.

When Mendez arrived he went to Okamoto's office. Only the two men were present. Okamoto said, "I think this is your last day. You're kind of fired." Mendez asked why he was fired. Okamoto responded by showing Mendez a coat hanging in the office and saying, "Because the uniform." It was one of Mendez's chef coats that he wore when cooking before customers.

A photograph of a chef coat was received as an exhibit. The credible and probative evidence shows that the photograph is of the coat that Okamoto displayed to Mendez. After being shown the photograph, Mendez testified as follows:

Q MR. SHUTE RESUMES: Is that your coat?
A It looks like that's -- it looks black, I guess navy blue.
Q It's the -- do you know if it's your coat or not?
A It is a chef coat.
Q Is it your coat?
A Yeah, can be.
Q Can you see that the arm is torn off of it?
A Yes, I can see that.
Q When -- didn't you testify that Takeo showed you the coat?
A I did -- Takeo showed me the coat.
Q Right. And was the arm torn off of it when he showed it to you?
A When he showed me the coat he -- he hang -- he point me to the coat and I just look at the coat and that's what I see now.
Q And you saw that the arm was town off of it.
A Yeah.
[emphasis added]

The photograph shows the appearance of the chef coat at the time of the meeting and that it was the coat issued to Mendez. The photograph discloses that the right sleeve is torn on the front and back from the shoulder to about the elbow. Mendez did not deny that the photograph was a fair representation of the chef coat Okamoto showed him during their meeting. The torn sleeve made the garment obviously unusable for its intended purpose.

Mendez acknowledged that he had a damaged chef coat that he had discussed with Lopez, but he denied that he was responsible for the torn sleeve evident in the photograph. Mendez testified that he told Okamoto one of his shirts was damaged and explained that he had told Lopez about the damage and that Lopez had instructed him to dispose of the coat. Mendez did not explicitly acknowledge that the coat with the torn sleeve was the damaged coat that he had discussed with Lopez, but this is the substance of what Mendez attempted to explain to Okamoto. The conversation was emotion laden and only lasted about two minutes. I credit Mendez's testimony regarding what occurred in Okamoto's office on December 16. The coat in the photograph was one issued to Mendez.

Respondent provided the coats worn by the chefs. Mendez had been issued about nine coats. At the end of a shift the chefs put the soiled coats in a designated spot to be laundered, inferentially by an outside laundry service. The testimony does not disclose whether the coat in the photograph had been worn since it was last laundered, but soiling is not evident in the photograph, consistent with it being a fresh coat. The testimony does not disclose when the

laundry delivered it or whether Mendez would have had an opportunity to either inspect the coat for damage caused by the laundry or to tear the sleeve himself before he was fired.

Takeo Okamoto did not testify. The Employer called Lopez, but he did not testify regarding the phone message that he left for Mendez on the afternoon of December 16 that Takeo Okamoto was very angry and wanted Mendez to call him, he did not testify about the damaged coat Mendez had discussed with him prior to December 16 and he did not testify about any knowledge he had regarding the reasons Mendez was discharged.

Thus, the Respondent failed, without explanation, to call Takeo Okamoto and failed to elicit relevant testimony from Lopez regarding Mendez's discharge. Takeo Okamoto was a supervisor and manager at the time of the hearing. Lopez was chief chef at the time of the hearing, possessed some indicia of supervisory status and supported the Respondent in the labor dispute. Lopez schedules the chefs, hot kitchen cooks and food preparation employees and orders the food. He was the regular communications channel between the chefs and kitchen workers and Okamoto. Both Okamoto and Lopez can reasonably be assumed to be favorably disposed toward the Respondent. When a party fails to call such witnesses, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972); *International Automated Machines*, 285 NLRB 1122, 1123 (1987); Made *4 Film, Inc*. 337 NLRB No. 179 (2002). The adverse inference rule permits an adverse inference to be drawn; it does not, however, create a conclusive presumption against the party. *Rockingham Machine-Lunex v. NLRB*, 665 F.2d 303 (8th Cir. 1981), cert. denied 457 U.S. 1107 (1982). The fact that Okamoto and Lopez did not testify regarding the circumstances surrounding the torn coat gives rise to an inference that their testimony would have been unfavorable to the Respondent. The absence of their testimony regarding Mendez's discharge not only strengthens the probative force of the witnesses for the General Counsel, but is itself is clothed with a certain probative force. *Pur O Sil, Inc.,* 211 NLRB 333, 337 (1974).

The Respondent presented hearsay testimony by Hines that the day after Mendez was fired she investigated the circumstances and was told by Takeo Okamoto that a waitress identified as Jena Durbin told him that she had observed Mendez tear the coat. Hines testified that she spoke with Durbin in January or February and Durbin confirmed that she had seen Mendez tear the coat, but was unwilling to testify because of a fear of retribution. Durbin was not shown to be otherwise unavailable or that she was disregarding a subpoena. While the Board sometimes gives weight to hearsay, it is not warranted on this record. Cf. *Midland Hilton & Towers*, 324 NLRB 1141, 1141 fn. 1 (1997); *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980); *Alvin J. Bart & Co.*, 236 NLRB 242, 242 (1978), enf. denied on other grounds 598 F.2d 1267 (2nd Cir. 1979). I have attached no weight to the testimony describing what Okamoto and Dublin told Hines about Mendez tearing the coat.

The weight of the evidence is that the coat in the photograph is the coat Lopez told Mendez he could discard. Mendez had found it embarrassing and offensive to wear the damaged coat, which was held together with tape and which sometimes exposed his torso. Even if Mendez willfully tore the coat, it would be probable that the tearing of the coat was an expression of his displeasure. Since Okamoto told him he was fired for tearing the coat without Okamoto asking for an explanation, it is understandable that Mendez might try to save his job by not admitting the act. Assuming that this was what happened, I would not discredit his other testimony for that reason.

Mendez began working at the Anchorage Benihana restaurant in December 1991. He came to the Anchorage operation from a Benihana restaurant in Beaverton, Oregon, where he

had worked as a chef for seven years. He was the Respondent's most experienced chef and was accordingly considered the second chef.[5] Prior to his discharge Mendez had never been disciplined in Beaverton or in Anchorage. After he was discharged, Mendez returned to his home and told the other chefs what had happened.

Im had a telephone conversation with Takeo Okamoto on December 16, following Mendez's discharge. Im was alone in his car outside the restaurant and used a cell phone. The conversation lasted about 15 minutes. The record does not disclose who placed the call. In the conversation Im asked Okamoto why the meeting with the chefs had been cancelled. Okamoto did not answer that question, but did tell Im that he had fired Mendez. Im asked Okamoto why Mendez had been fired, but Okamoto offered no explanation. Im described Okamoto as sounding very angry and that Okamoto asked him who was the leader and who had started it. This was clearly a reference to the employees' concerted complaints. Im answered that there was no leader. Okamoto asked Im to work that night. While he was talking to Okamoto, Im observed Mendez leaving the restaurant.

When Im finished his conversation with Okamoto he went to Mendez's house. With all seven chefs present they discussed the situation and all but Koko signed the letter to Okamoto that Bae has prepared. Koko said he wanted to speak with Okamoto first.

Koko then went to the restaurant, where he met with Atsuko Okamoto and Lopez. Koko told Atsuko Okamoto and Lopez that all the chefs were at Mendez's house, that they were talking about striking and that they had a paper that everybody but Koko had signed. Koko suggested that everybody should sit down and talk. Koko said he was asked why the chefs would strike. According to Koko, he replied, "I told them they're striking because a meeting was cancelled and meetings for ventilation, work condition, relationships with other chefs and that we didn't have that meeting and that's what I -- I told them." Koko then testified as follows:

> Q Did Mr. Mendez's name come up during this meeting?
> A Not really. No, not too much.
> Q Did you know at that point whether Mr. Mendez had been fired?
> A Yeah, I'd just been informed maybe 10 minutes before that.
> Q Before what?
> A Before I had that meeting with Atsuko and -- unscheduled meeting with Atsuko and Ever.
> Q Did Atsuko or Ever discuss Romy's termination with you?
> A No, not too much, not really.
> Q Not during this meeting.
> A No, not during this meeting.
> Q And you had -- you had learned 10 minutes before that that before you went to meet with Atsuko and Ever that Mr. Mendez had been discharged.
> A Yes.
> Q And is it your testimony today that you did not discuss Mr. Mendez with Atsuko and Ever at that meeting?
> A Yes sir. Or I believe I brought up real quick that Romy's termination triggered it at the time.
> Q Triggered what?
> A The strike. It would just push the chefs over. And when they cancelled.....

[5] The Respondent does not argue, and the record does not demonstrate that Mendez was a statutory supervisor.

Q [interrupting] And who'd you say that to?
A To I believe Ever and Atsuko.

Further testimony by Koko that Mendez's discharge might be a cause for the chefs to strike was elicited by additional leading questions.

The persuasiveness of Koko's testimony describing his discussion of Mendez's discharge with Atsuko Okamoto and Lopez is lessened because it had to be elicited by leading questions, as well as his qualification that he "believed" he brought up "real quick" Mendez's termination. Moreover, his testimony that he said that Mendez's discharge "triggered it at the time" is awkward. Nevertheless, I conclude that in his conversation with Atsuko Okamoto and Lopez, Koko did assert that one of the reasons the employees were prepared to strike was Mendez's discharge. In reaching this conclusion I have considered Koko's status as an employee of the Respondent at the time he testified who might well be reluctant to testify to events that were inconsistent with the interests of his employer. In addition, the Respondent failed, without explanation, to call Atsuko Okamoto and failed to elicit testimony from Lopez on this fact issue, from which I draw adverse inferences. The testimony of Everett Scott Burnett shows that Atsuko Okamoto was still a supervisor at the time of the hearing and Lopez testified that he was chief chef at the time of the hearing, he possessed some indicia of supervisory status and he supported his employer in the labor dispute. Both Atsuko Okamoto and Lopez can reasonably be assumed to be favorably disposed toward the Respondent. Considering all the foregoing, as well as the probability that Koko would have made some mention of Mendez's discharge at the meeting, I find that the factors favoring Koko's veracity outweigh the weaknesses in his testimony regarding the conversation. The balance of Koko's testimony was convincingly offered. Accordingly Koko's testimony regarding his meeting with Atsuko Okamoto and Lopez is credited and I conclude that he advised management, in substance, that the employees were prepared to strike because of employee dissatisfaction with tips, the asserted ventilation problem and because Mendez had been discharged.

Following his meeting with Atsuko Okamoto and Lopez, Koko returned to Mendez's house and described the meeting to the other six chefs. Ticknor credibly testified that Koko reported that he had told Okamoto and Lopez that "they were going to strike over tips, ventilation system and Romy being fired." Koko added his signature to the letter to Takeo Okamoto. Bae then hand-delivered the letter to Okamoto. The chefs did not report for work that night. The restaurant was unable to operate and closed.

The strike notice was delivered and the strike began a few minutes before the evening shift was to report for duty on a weekend in the busy holiday season. The striking employees were aware that the restaurant would not be able to operate because of the strike.

4. December 17-18

On December 17, the striking chefs did not report for work and six of the chefs picketed in front of the restaurant for about two hours in the afternoon. Representatives of the Union joined them on the picket line. This was the first open involvement of a labor organization in the dispute. The record does not reflect the language on any picket signs or what message, if any, was conveyed to persons in the vicinity of the restaurant by picket signs or by other means.

Because of the specialized nature of the work of Benihana chefs, a pool of trained tepanyaki chefs is available to Benihana franchisees to address unforeseeable work stoppages. When the chefs struck, the Respondent sought replacement chefs from this pool and began training of kitchen employees to work as tepanyaki chefs. On December 17 Takeo Okamoto

entered an agreement with Benihana Beaverton regarding six replacement chefs. The terms of the December 17 letter agreement signed by Takeo Okamoto and the Beaverton Benihana manager were as follows:

> This letter is to confirm our verbal agreement for assistance in reopening Benihana of Alaska as quickly as possible.
>
> 2 from San Francisco, CA-December 17 to January 20
> 1 from Monterey, CA-December 17 to January 20
> 1 from Beaverton, OR-December 17 to January 20
> 1 from Anaheim, CA-December 17 to January 20
> 1 from Lima, Peru-December 17 to March 1
>
> These chefs will be paid $11.00 per hour for a minimum of 40 hours per week.
>
> If each chef does not earn a minimum of $130.00 per day in tips, Benihana of Alaska will make up the difference.

On December 18 Takeo Okamoto sent a letter addressed to each of the six strikers in which he responded to their concerns expressed in the employees' December 16 letter to him. The letter stated that the tip distribution was in conformity with national Benihana policy and would not be changed. The letter also reviewed what had and would be done regarding ventilation. The letter invited any questions the employees might have.

5. December 20–29

The temporary chefs flew to Anchorage at the Employer's expense and the restaurant reopened on December 20, using the replacement chefs. On December 20, following the reopening, a union representative hand delivered to the Respondent a letter signed by Bae, Im, Mendez, de la Cruz, Koko, Lee, and Ticknor offering unconditionally to return to work. This is the earliest direct evidence of the Employer's knowledge of the Union's involvement in the labor dispute. The Respondent's attorney responded to the letter the same day. The attorney stated that Respondent's owner, John Blomfield, was in Mexico on business and had not planned to return to Anchorage until March 2002, but was prepared to return to Anchorage the last week in January to discuss the matter. The attorney offered to facilitate such a meeting. The Respondent did not contact the individual chefs who had offered to return to work. On December 29, Im individually spoke with Takeo Okamoto at the restaurant and unsuccessfully sought reinstatement.

At some point not disclosed by the record the Union began efforts to organize the employees. Dishwasher/janitor Everett Scott Burnett credibly testified that he was approached by Atsuko Okamoto and asked whether he had signed a union card and whether anyone from the Union had come to his house. Burnett was apprehensive and falsely denied having signed a card. Burnett did not have a good recollection of when the conversation occurred. When he initially was asked when the conversation occurred, he repeatedly said he was not sure. When he was then asked when the conversation occurred in relation to Christmas, he testified that it was "Maybe a week before Christmas." Burnett's account of the substance of the conversation is credited. I find that the evidence does not establish when the conversation occurred and specifically that the evidence does not establish that the conversation occurred prior to the Employer's December 20 letter to the Union. In reaching this conclusion I have considered Burnett's demeanor, his obvious lack of an actual recollection of the date of the conversation and an adverse inference I draw from the failure of the General Counsel, without explanation, to

either call a witness from the Union or to produce the card Burnett signed. Considering the probabilities, and based upon the adverse inference, I affirmatively find that the conversation occurred after December 20, in late December or early January.

6. Other activity

Tamela Hines and Steven Bae testified about an incident Bae called a "union night." Bae was present in the restaurant. Hines was at another location speaking by phone with Takeo Okamoto. She credibly testified that she heard clapping and yelling and asked what was going on. Okamoto told her that the striking chefs and others were in the restaurant raising a commotion and putting on masks and that they left. Bae confirmed that he was one of a group of strikers and others who went into the restaurant bar wearing masks, that they picked up their checks and left. The record does not establish the date of this incident and there is no evidence that it was addressed in communications between the Employer and either the striking employees or the Union.

7. The reinstatement of employees

On January 4, 2002 strikers Bae, Im, de la Cruz, Koko, Lee, and Ticknor, the Employer and Union agents met at the restaurant and reinstatement was discussed. There was a second meeting on January 7, when the employees were told the Employer was prepared to offer the six employees work, but at reduced hours, with the option of additional hours performing "prep" work and "hot kitchen" work that had been done only by kitchen employees before the strike. The prep work and hot kitchen work was viewed as less desirable by the chefs. The employees were told that the Respondent had a 30-day contract with the chefs flown in as strike replacements and that the strikers would be worked back into the schedule when the strike replacements were gone. After the restaurant reopened on December 20, four kitchen employees were trained as tepanyaki chefs, presumably under the tutelage of Lopez and/or the strike replacements. The record does not establish when this training began. Lopez credibly testified that about 1½ months of training was necessary before the chef trainees were sufficiently skilled to cook for customers. The kitchen employees had not worked as tepanyaki chefs before the strike, but continued to be assigned chef work following the strike.

Scheduling records indicate that Koko and Ticknor were first scheduled to work the week beginning January 13, while Lee, Bae Im and de la Cruz were first scheduled the week beginning January 20. All were scheduled for a sharply reduced number of hours. The chefs worked about 37 hours per week before the strike. For the three-week period December 20-February 9 the six employees were scheduled for the following total number of hours: Bae-5; de la Cruz-13; Im-5; Koko-51; Lee-15, Ticknor-37.

By about February 10, five of the strike replacements had left. At that point there were 12 people were available to work as chefs – the six strikers, four kitchen workers who had been given chef training following the strike, and a strike replacement chef who had been made a permanent employee on a date not disclosed by the record. At the time of the hearing there were eight chefs, including Lopez, the same number as before the strike. Chefs were still doing some of the prep work and hot kitchen work, although at a reduced level.

The scheduling records in evidence can be summarized as follow. Beginning about February 10 some of the strikers were assigned a greater number of hours, including chef and kitchen work. Koko and de la Cruz were being assigned approximately the same number of hours as before the strike as of late February. Ticknor was assigned an average of 32 hours per week for the period February 10-23 and he requested part-time status on February 20. Im was

assigned 20 hours the week beginning February 20, followed by assignments of 21-25 hours per week the following four weeks. He chose to not work those hours. Lee was assigned 32 hours the week beginning February 10. He chose to not work those hours. The schedule notes that Lee declined to accept kitchen work and that he was told that no more chef hours were available. Bae was assigned 32 hours the week beginning February 10. He continued to average less than his usual pre-strike 37 hours per week, until he resigned on April 5 to operate his own business. The schedule notes that Bae declined to accept kitchen work and that he was told that no more chef hours were available.

A. Analysis

1. The labor Organization Status of Local 878

As noted above, the complaint alleges and the Respondent denies that Local 878 is a labor organization within the meaning of Section 2(5) of the Act. The burden is on the General Counsel to prove that Local 878 is a labor organization as that term is defined in the Act. *General Foods Corp.,* 231 NLRB 1232 (1977).

Section 2(5) of the Act sets forth two criteria which an organization must meet in order to constitute a labor organization: (1) the organization must be one in which employees participate and (2) the organization must exist for the purpose, in whole or in part, of dealing with employers concerning employee grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. *United Truck and Bus Service*, 257 NLRB 343, 343-344 (1980).

The complaint identifies Local 878 as being affiliated with the International. I take administrative notice of the numerous prior Board decisions in which the International has been found to be a labor organization. No reported cases have come to my attention where the Board found Local 878 to be a statutory labor organization. The bare assertion in the charge filed in case 19-CA-27913 that Local 878 is affiliated with the International is not sufficient to prove the affiliation. Moreover, mere affiliation with a labor organization does not in and of itself make the affiliated organization a labor organization. *Licensed Tugmen's & Pilots' Protective Ass'n (Twin City Barge & Towing)* 138 NLRB 222, 231 (1962). Thus, assuming that Local 878 is affiliated with the International, it cannot be assumed that Local 878 exists to represent statutory employees or that employees participate in it to any significant extent. See *Duquesne University*, 261 NLRB 587, fn. 4 (1982); *The Wackenhut Corporation* 271 NLRB 70 (1984).

The record nevertheless contains evidence that Local 878 is a statutory labor organization. A representative of Local 878 assisted Bae in drafting the December 16 strike notice. On December 17 six of the chefs picketed in front of the restaurant for about two hours and were joined on the picket line by representatives of Local 878. On December 20 a Local 878 representative hand delivered a letter to the Respondent from the striking employees offering unconditionally to return to work. Following the strike there were efforts to organize the employees and employee Burnett described having signed a card for Local 878. In January Local 878, together with former strikers, met with the Employer to discuss the recall of the employees. A Board election involving Local 878 was conducted among the Respondent's employees in February or March 2002 and Respondent's counsel acknowledged that a certification issued. Bae was an observer at the election, inferentially for Local 878. The labor organization status of Local 878 was therefore either found or stipulated to in a Board representation case. The evidence is sufficient to demonstrate that Local 878 meets the statutory criteria and that it is a labor organization within the meaning of Section 2(5) of the Act.

2. The concerted employee complaints

The chefs' concerted attempts to change the tip distribution and to improve ventilation are classic examples of activity protected by Section 8(a)(1). They did not lose their protected status when the chefs continued to press their position after the Respondent made apparent good faith efforts to address the ventilation concerns and considered the employees' position on tips.

3. The questioning of employees

The evidence shows that Takeo Okamoto called Bae to his office on December 16 and asked him who had started the issue about the tips and ventilation. Also on December 16, Okamoto asked Im in a telephone conversation who the leader was and who had started it, a reference to employees' protected activities. In late December or early January, Atsuko Okamoto approached Burnett and asked him whether he had signed a union card and whether anyone from the Union had come to his house or called. The complaint alleges that each of these instances of questioning of Bae, Im and Burnett violated Section 8(a)(1).

In each instance the questioning by an admitted supervisor and agent would reasonably tend to restrain or coerce employees in the exercise of their Section 7 rights. In each case the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation all support a conclusion that the questioning was unlawful. Thus, the questioning of Bae was the day after Takeo had canceled a meeting to discuss the chefs' complaints and after Takeo had told the chefs that they could go home and never return. The questioning of Burnett occurred shortly after the Respondent replaced the striking employees and after an effort had begun to organize the employees. Each of the interrogations violated Section 8(a)(1). See *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Avery Leasing*, 315 NLRB 576, 580 (1994). Accordingly, I conclude, as alleged in the complaint, that the Respondent violated Section 8(a)(1) when Takeo Okamoto questioned Bae and Im on December 16 and when Atsuko Okamoto questioned Burnett following the strike.

4. The discharge of Mendez

The General Counsel argues that the evidence establishes that the Employer discharged Mendez on December 16 in retaliation for his participation with the other chefs in protected activity. The Employer argues that the government has not met its burden of proof to establish that the discharge was unlawfully motivated and further contends that the evidence affirmatively shows that Mendez was discharged for cause because he tore the sleeve of a chef coat.

To set forth a violation in dual motive Section 8(a)(1) discrimination cases, the General Counsel is required to show by a preponderance of the evidence that animus against protected activity was a motivating factor in the employer's conduct. To sustain this initial burden, the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). See also *Manno Electri*c, 321 NLRB 278 at fn. 12 (1996). Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a fact issue. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enforcing 314 NLRB 1169 (1994); *Andrex Industries Corporation*, 328 NLRB No. 180 (August 30, 1999).

If the General Counsel's initial burden is satisfied, the employer may escape liability for its action by either disproving one or more of the critical elements of the General Counsel's case or by establishing as an affirmative defense that the employer would have taken the same action even in the absence of the employee's protected conduct. *TNT Skypak, Inc*., 312 NLRB 1009, 1010 (1993).

The evidence presented to satisfy the General Counsel's initial burden must be analyzed separately from the employer's defense. *Pace Industrial*, 320 NLRB 661 (1996), enfd. 118 F3d 585 (8th Cir. 1997). Nevertheless, the employer's stated reasons for adverse action against an employee can be considered as a part of the General Counsel's initial burden and if they are pretexts they can support an inference that the employer had an unlawful motive. *Black Entertainment Television,* 324 NLRB 1161 (1997). The entire record may be examined to ascertain whether the adverse action was motivated by union activity. Thus, in determining whether the evidence presented has satisfied the General Counsel's initial burden, the evidence is not limited to the evidence introduced by the General Counsel, but can also include the reasons advanced by the employer for its action and any additional reasons offered at the hearing. *Williams Contracting*, 309 NLRB 433 (1992).

The General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to terminate Mendez, based on Okamoto's interrogation of Bae and Im on the same day Mendez was fired regarding the identity of the instigator of the concerted action regarding the tips and ventilation. Accordingly, the Respondent has the burden of demonstrating that the same action would have taken place even in the absence of the protected conduct. This the Employer has not done. Rather, the evidence shows that the reason given for Mendez's discharge was a pretext. Lopez had told Mendez to discard the coat. On the day Mendez was discharged, Lopez called and left a message for Mendez that Takeo Okamoto was very angry and wanted to see Mendez. I draw an adverse inference from the failure of the Employer to call Okamoto, as well as the failure of the Employer to elicit testimony from Lopez about the circumstances of the discharge. Mendez was the Respondent's most senior employee, he had never been disciplined, he was second chef and trained tepanyaki chefs were not easily replaced. Based upon these facts, the most reasonable interpretation is that Okamoto seized on the damage to the coat as a pretext to retaliate against Mendez because of the employees' protected activities. See *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). The evidence is strong that protected conduct was the motive for the discharge and the Respondent has not met its *Wright Line* burden. Accordingly, I find that by discharging Mendez on December 19 Respondent has committed an unfair labor practice, in violation of Section 8(a)(1) of the Act.

The complaint also alleges that the December 16 discharge of Mendez violated Section 8(a)(3). The record discloses no substantial and probative evidence to support a finding that Respondent discharged Mendez because of his or other chefs' activities on behalf of the Union. Accordingly, this allegation will be dismissed.

Mendez was offered reinstatement to his former position on July 6, 2002, with 33-40 hours per week at an increase wage rate and with no requirement that he perform extra kitchen work. At the hearing he testified that he had not decided whether to accept the offer because of commitments he had to another employer. The sufficiency of the offer can be addressed in compliance.

5. The strike

The complaint alleges that the strike was caused by the interrogation of employees in violation of Section 8(a)(1) and by the discharge of Mendez. There is an absence of substantial and probative evidence that the strike was motivated by the interrogations. The Respondent acknowledges on brief, however, that the strike was motivated, in part, by Mendez's discharge. Thus, the Respondent states on brief, "Here the cooks walked out primarily in anger over Romy's being terminated…." The record evidence affirmatively shows that the strike was, in part, a protest of Mendez's discharge. Thus, the final decision to deliver the December 16 letter to the Employer and to strike was made after Mendez's discharge and after Koko's final plea to Atsuko Okamoto and Lopez, when he told them that one of the reasons the employees were going to strike was Mendez's discharge. I attach little significance to the absence of any mention of Mendez in the letter to the Employer because the letter had been prepared in advance, to be used if the employees decided to strike. Accordingly, viewing the record as a whole, I conclude that the strike was, in part, in protest of Mendez's discharge. Because Mendez's discharge violated Section 8(a)(1) of the Act, the strike was an unfair labor practice strike from its beginning. *Precision Concrete*, 337 NLRB No. 33, slip op. at 3 (Dec. 20, 2001).

6. The refusal to immediately reinstate the strikers

The complaint alleges that the Respondent failed and refused to immediately reinstate the unfair labor practice strikers to their former positions of employment when they unconditionally offered to return on December 20, in violation of Section 8(a)(1) and (3).

The denial of immediate reinstatement to the unfair labor practice strikers to the jobs they held before the strike following their unconditional offer to return to work was inherently destructive of the strikers' Section 7 rights. *Action Temporary Employment*, 337 NLRB No. 39 (2001). See NLRB v. *Fleetwood Trailer Corp*., 389 U.S. 375, 379-380 (1967), citing *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967) and *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). Accordingly, the Respondent violated Section 8(a)(1) by not reinstating Lim, Bae, Koko Ticknor, Yi and de la Cruz.

The Respondent argues that a different conclusion is warranted under the rational of *Bob Evans Farms, Inc. v. NLRB*, 63 F.3d 1012 (7th Cir. 1998), denying enforcement of 325 NLRB 138 (1997). In *Bob Evans* a restaurant supervisor was fired and nearly all of the employees under her supervision walked off the job at the start of a busy Friday evening shift. The employees later sought to return to work but reinstatement was denied. The court concluded there was such a wide disparity between the grievance and the disruptive walkout that the employees lost the protection of the Act. A similar result was reached in *Dobbs Houses v. NLRB 325* F.2d 531 (5th Cir. 1963), another case involving employees walking off the job to protest the discharge of a supervisor. In *Trompler, Inc.,* 335 NLRB No. 41, slip op. at 4 (2001) the Board reviewed the decisions in *Bob Evans* and as *Dobbs Houses* and concluded:

> We respectfully adhere to Board precedent in determining whether employee protests concerning supervisors constitute protected activity. In our view, if employees are protesting working conditions, whether caused by a supervisor or by higher management action, those employees can protest by any legitimate means, including striking. The fact that some lesser means of protest could have been used is immaterial.

Thus, the Board has not followed *Bob Evans* and *Dobbs Houses.* In any case, the rationale of the courts in those cases is not applicable in the present case. The courts in *Bob Evans* and in *Dobbs Houses* viewed the discharge of a supervisor as being an attenuated

employee interest that had to be balanced against the harm inflicted by a strike. In contrast, the concerns of the striking Benihana employees involved fundamental issues at the core of the Act. Further, in *Bob Evans* and *Dobbs Houses*, the employees did not attempt to address their concerns with management prior to their work stoppages. In contrast, the Benihana employees repeatedly tried to discuss their concerns regarding tips and ventilation with management. Their attempts were met with hostility and one of their number was fired in retaliation for the protected concerted activities. The strike served a legitimate work-related goal and was protected by the Act. See *NLRB v. A. Lasaponara & Sons,* 541 F.2d 992, 998 (2nd Cir. 1976).

The arrangements that the Employer made with Benihana Beaverton for strike replacements did not privilege the Employer to delay reinstatement of the strikers. As stated by the Supreme Court in *NLRB v. International Van Lines*, 409 U.S. 48, 50-51 (1972):

> It is settled that an employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements. *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333, 345--346, 58 S.Ct. 904, 910--911, 82 L.Ed. 1381. It is equally settled that employees striking in protest of an employer's unfair labor practices are entitled, absent some contractual or statutory provision to the contrary, to unconditional reinstatement with back pay, 'even if replacements for them have been made.' *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278.[6]

The Employer has not contended that requiring the reinstatement of any of the strikers would not effectuate the policies of the Act because of their involvement in the "union night" demonstration. Moreover, reinstatement is not necessarily dependent upon a determination that particular strike activity is protected where the strike was caused by an unfair labor practice. *NLRB v. H. N. Thayer Co*., 213 F.2d 748, 753 (1st Cir. 1954).

Accordingly, the Employer violated Section 8(a)(1) by not reinstating Lim, Bae, Koko Ticknor, Yi and de la Cruz when they applied for reinstatement on December 20. Assuming, without deciding, that the Employer had contracted to employ the replacements for a fixed period, that fact would not be a justification for denying the strikers immediate reinstatement. The Employer had no more legitimate and substantial business justification for delaying immediate reinstatement of the unfair labor practice strikers that does an employer who has contracted out work, a claim that the Board has rejected. See *Land Air Delivery v. NLRB*, 862 F.2d 397 (D.C. Cir. 1988), cert. denied, 493 U.S. 810 (1989).

The Board's established policy is to allow employers five days to reinstate unfair labor practice strikers after they make a full and unconditional offer to return to work as a reasonable accommodation between the interests of the employees in returning to work as soon as possible and the employer's need to ensure an orderly return. *Paul Mueller Co.*, 332 NLRB No. 29 (2000). This five day period is not to enable the employer to delay reinstatement or to obtain five days during which backpay is not required. Where, as here, an employer has clearly indicated an unwillingness to reinstate unfair labor practice strikers forthwith and, in circumstance like those in the present case, delays or denies reinstatement, the employees are entitled to backpay running from the dates of their offers to return. *Drug Package Co*., 228 NLRB 108, 114 (1977); *Pinnacle Metal Products Co*., 337 NLRB No. 128 slip op. at 16 (2002). The Respondent had a duty to immediately reinstate the strikers upon their unconditional

[6] The record does not establish whether the replacement chef who was made a permanent employee had that status at the time the strikers offered to return. Resolution of that question is not necessary in the context of an unfair labor practice strike.

application for reinstatement and, if necessary, to discharge the strike replacements hired during the strike. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278-79 (1956). [7]

The complaint alleges and the General Counsel on brief argues that the strikers were also denied reinstatement because they engaged in union activities, in violation of Section 8(a)(3). The burden of proof on this issue has not been met. The Employer made the arrangements for strike replacements prior to the time the evidence shows any knowledge of the employees' union activity. The interrogation of Burnett about union activities occurred after the Employer communicated it's intentions regarding the recall of the strikers and the subsequent interrogation in the context of the other evidence is insufficient to establish that the involvement of the union was a motive for the discrimination.

It is also alleged that the Employer independently violated Section 8(a)(1) and (3) by not reinstating Mendez following the Union's delivery of the December 20 letter signed by Mendez and the other employees offering unconditionally to return. There is no dispute that Mendez had already been fired on December 16, and was refused reinstatement until at least July 6, 2002. On brief the General Counsel argues, without citation of authority or other argument, "[T]here is sufficient evidence to establish that Respondent refused to reinstate Mendez to discourage other employees from making further complaints about their working conditions and to discourage the employees from supporting the Union." I find this contention unpersuasive and the allegation shall be dismissed.

6. A motion to amend the complaint

At the opening of the hearing the General Counsel moved to amend the complaint to allege that the strikers were terminated on December 17 in violation of Section 8(a)(1) and (3) of the Act, "because they engaged in a protected strike and to prevent possible organizing on behalf of the union." The Respondent opposed the motion based upon a lack of notice. The motion was denied. On brief the General Counsel renews the motion.

Section 102.17 of the Board's rules permits the amendment of a complaint by the assigned administrative law judge, upon motion, during a hearing and until the case is transferred to the Board, upon such terms as may be deemed just. The administrative law judge has wide discretion to grant a motion to amend a complaint. *Pincus Elevator*, 308 NLRB 684 (1992).

In *Consolidated Printers, Inc.* 305 NLRB 1061 (1992), the administrative law judge, with Board approval, denied a motion to amend the complaint at trial. The judge noted that in *New York Post*, 283 NLRB 430 (1987), the Board had reversed an administrative law Judge who had allowed a last-minute amendment to the complaint over the objection of the respondent. As stated by the judge in *Consolidated Printers* at 1064*:*

> Therefore last minute amendments must be justified by the General Counsel. For such an amendment to be just there can be no doubt that delay on the part of the government in proposing its amendments to the complaint was used to gain an advantage over Respondent. Where no or an insufficient explanation is made to explain a prosecutorial

[7] There has been no contention that the Employer had a duty to cease assigning chef work to kitchen employees who had trained as chefs during the strike or to refrain from assigning kitchen work to the returning strikers on a non-discriminatory basis.

delay in proposing an amendment to the complaint or in informing Respondent that such an amendment will be proposed, the motion to amend the complaint should be denied.

The complaint in the present case alleged that the strikers were denied reinstatement since December 20, in violation of Section 8(a)(1) and (3). The General counsel minimizes the significance of the proposed additional allegation. At the hearing the General Counsel argued, "The defenses that the Employer is going to raise to this allegation is the same type of defense that it's going to raise to the failure to reinstate the strikers immediately. We're talking about a matter of a few days. It's really not a major change." On brief the General counsel argues, "[T]he events and facts surrounding the alleged discharge are identical, and the defenses that Respondent would raise are identical to the defenses in this matter. Indeed, the 8(a)(3) theory is the same: Respondent retaliated against employees because they engaged in a protected unfair labor practice strike." The General Counsel represented that the proposed allegation would be proved by the testimony of a single witness, described at the hearing as a reporter "in the media", who would relate a single conversation. On brief the General Counsel states that the conversation was between Takeo Okamoto and a television reporter.

I do not agree with the assertion that the proposed amendment was not major. If allowed, the amendment would put in issue the question of whether a violation occurs and backpay begins to accrue from the date an employer makes a decision to discriminate, rather that when actual discrimination occurs. This would be a significant departure form longstanding precedent. See *Louisiana-Pacific Corp.,* 282 NLRB 1303 (1986). The test for determining whether an employer's statements or conduct constitute a discharge is whether the employer's conduct would reasonably lead employees to believe that they had been discharged. *FiveCAP, Inc*., 331 NLRB 1165 (2000). There is no evidence that the Benihana strikers had reason to believe, prior to December 20, that they would be denied reinstatement.

The General Counsel was familiar with the identity of the witness and the testimony to be elicited well in advance of the hearing. Nevertheless, prior notice of the substance of the amendment was not given to Respondent. The stated reason for delaying giving notice was that the government was unwilling to proceed unless and until the reporter agreed to voluntarily appear and testify. The General Counsel explained that the reporter needed permission from his superiors to testify and that permission had not been granted until the weekend before the hearing. Based upon assurances that the reporter would appear and testify, he was then served with a subpoena on the day before the hearing.

From the bench the government was invited to offer a justification for this procedure and counsel was specifically asked whether the problem was a possible claim that the conversation was privileged.[8] The only reason advanced by the General Counsel was that the witness might not be permitted to testify by his employer. The General Counsel has offered no convincing explanation of why a last minute motion to amend a complaint without meaningful notice should be allowed, where the timing was dictated only by when a witness was given permission by his employer to testify.

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[8] See the discussion of privilege and the press under the First Amendment in the appendix to the judges' opinion in *M. J. Mechanical Services, Inc.*, 324 NLRB 812, 832-833 (1997). See also *NLRB Casehandling Manual* 11770.4. Assuming that a reason for the course followed by the General Counsel was to avoid issues of privilege at trial, it would not change my decision. The mere possibility that the witness might claim privilege at trial does not trump the due process rights of the Respondent and is entitled to little weight in balancing the competing interests.

On brief the General Counsel asserts that the Government was denied the opportunity to make an offer of proof in support of the motion to amend. It is correct that the General Counsel was not permitted to introduce testimony in support of the motion. The General Counsel was not, however, denied the opportunity to state on the record what he expected the reporter's testimony would be. In any case, the issue was not whether the General Counsel had evidence to support the theory underlying the proposed amendment.

The motion to amend was denied principally based upon considerations of procedural due process and little in the way of countervailing considerations. The decision is reinforced by considerations of judicial economy. If the proposed amendment and the permission of the witness's employer were as important as now claimed, a prehearing motion to postpone could have might have been sought. If the amendment had been granted, the Respondent would not have been denied a continuance.

I deny the renewed motion.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively questioning employees concerning their union or protected concerted activities the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging employee Romulo Mendez because he and other employees engaged in protected concerted activities the Respondent violated Section 8(a)(1) of the Act.

5. The strike in which the employees engaged from December 16, 2001, until December 20, 2001, was caused in part by the Respondent's unfair labor practice of discharging employee Romulo Mendez.

6. Since on or about December 20, 2001, the Respondent has violated Section 8(a)(1) of the Act by denying or unreasonably delaying the reinstatement of its chefs who had unconditionally offered to return from their unfair labor practice strike.

7. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent has not otherwise violated the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Because it discriminatorily discharged an employee and denied other employees who had engaged in an unfair labor strike full and immediate reinstatement following their

unconditional offer to return to work, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed in the manner prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondent will be required to post appropriate notices to employees. An expungement order regarding the record of the unlawful discharge will issue. The sufficiency of past offers of reinstatement and specific monetary remedies shall be determined at the compliance stage of this proceeding.

. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Alaska Tepanyaki, LLC d/b/a Benihana's, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively questioning any employee concerning union or protected concerted activities.

(b) Discharging any employee because of protected concerted activities of employees.

(c) Delaying or denying reinstatement to any employee who has made an unconditional offer to return to work from an unfair labor practice strike.

(d) In like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative actions, which are necessary to effectuate the policies of the Act:

(a) To the extent that it has not already done so, offer to employee Romulo Mendez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position of employment without prejudice to his seniority or any other rights or privileges that he previously enjoyed, and make him whole for any loss of earnings or other benefits that he may have suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, expunge from its files all references to the unlawful termination of Romulo Mendez, and within 3 days thereafter, notify him in writing that this has been done and that his termination will not be used against him in any way.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) To the extent that it has not already done so, offer to employees Steven Bae, Eltie Im, Danny de la Cruz, Chris Koko, Ki Lee, and Edward Ticknor, who participated in the unfair labor practice strike that began on December 16, 2001, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment without prejudice to their seniority or any other rights or privileges that they previously enjoyed, and make those employees whole for any loss of earnings or other benefits that they may have suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(e) Within 14 days after service by the Region, post at its Anchorage, Alaska facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, while these proceedings are pending, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, San Francisco, California, February 27, 2003.

Thomas M. Patton
Administrative Law Judge

[10] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

JD(SF)-10-03
Anchorage, Alaska

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about employees' union support or activities or about other protected concerted activities of employees.

WE WILL, to the extent that we have not already done so, offer to employees Steven Bae, Eltie Im, Danny de la Cruz, Chris Koko, Ki Lee, and Edward Ticknor, who participated in the unfair labor practice strike that began on December 16, 2001, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or any other rights or privileges that they previously enjoyed.

WE WILL make employees Steven Bae, Eltie Im, Danny de la Cruz, Chris Koko, Ki Lee, and Edward Ticknor, who participated in the unfair labor practice strike that began on December 16, 2001, whole for any loss of earnings or other benefits that they may have suffered as a result of the discrimination against them

WE WILL, to the extent that we have not already done so, offer to Romulo Mendez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job without prejudice to his seniority or any other rights or privileges that he previously enjoyed.

WE WILL make Romulo Mendez whole for any loss of earnings or other benefits that he may have suffered as a result of the discrimination against him.

WE WILL remove from our files any reference to the discharge of Romulo Mendez and we will notify him in writing that this has been done and that it will not be used as a basis for future personnel actions against him.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of any of the rights stated above.

Alaska Tepanyaki, LLC
d/b/a Benihana's

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 Second Avenue, Federal Building, Room 2948, Seattle, WA 98174-1078
(206) 220-6300 Hours: 8:15 a.m. to 4:45 p.m.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above regional office's compliance officer, (206) 220-6284